Sunrise Health Care Corporation d/b/a Mediplex of Stamford *and* New England Health Care Employees Union, District 1199, AFL–CIO. Cases 34–CA–7692–1, 34–CA–7691–2, 34–CA–7709, and 34–CA–7751

August 2, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On February 4, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a brief in support. The Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified below, and to adopt the recommended Order.

The judge dismissed the complaint allegations that Supervisor Carlos Pena threatened employees with more onerous working conditions and that various actions taken by the Respondent against certified nursing assistants (CNAs) Marie Montas, Judy Davis, Minouche Ferdinand, and Marie Duclos, including changes in working hours, suspensions, and terminations, were discriminatory. With respect to the actions taken against the four CNAs, the judge concluded that the General Counsel failed to establish knowledge or animus.

Contrary to the judge, we find that the General Counsel established that the Respondent had knowledge that Montas, Davis, Ferdinand, and Duclos supported, and were active on behalf of, the Union. All 4 CNAs, along with approximately 75 other union supporters, signed a petition on the eve of the August 1996 election indicating their support for the Union. The Respondent received a copy of this petition and carefully reviewed the signatures. Indeed, it based two of its objections to the August 1996 election on the petition. The Respondent alleged that the Union "fraudulently published the forged signatures of employees misrepresenting that they endorsed the Union" and "fraudulently procured signatures indicating the employees who supported the Union." At the objections hearing, Lynn Hawkins-Winslow, the Respondent's administrator, testified that she reviewed the petition on the morning of the election and circled certain names that she believed were forged.[4] The Respondent's handwriting expert also testified that he believed that as many as 11 signatures were forged. Obviously, in order to determine which signatures were not authentic, the Respondent had to review all the signatures on the petition, including those of Montas, Davis, Ferdinand, and Duclos (whose signatures the Respondent did not challenge).[5]

The judge also found that the General Counsel failed to establish antiunion animus.[6] The judge acknowledged that Board law permits the use of evidence of an employer's election campaign in order to show animus in an unfair labor practice trial.[7] Nevertheless, he found that such evidence could not be used by the General Counsel in the instant case to establish animus.

The judge's finding directly contravenes well-established Board precedent holding that while protected speech, such as an employer's expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LCC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001); and *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989). However, even assuming that the General Counsel established animus, we find, given the judge's credibility based findings, that the Respondent met its *Wright Line*[8] burden of showing that it would have taken the same actions even in the absence of any union activity on the part of Montas, Duclos, Ferdinand,

[1] The Respondent has filed a motion to strike portions of the General Counsel's brief. In light of our disposition of this case, we find it unnecessary to pass on the Respondent's motion.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge's third conclusion of law is amended to read, "Respondent did not violate Section 8(a)(1), (3), and (4) of the Act as alleged in the complaint."

[4] All of the alleged actions against the CNAs occurred after the August election. Contrary to the judge's finding, Davis was suspended on September 25, rather than June 25.

[5] Moreover, the record establishes that both Ferdinand and Montas attended the objections hearing on behalf of the Union. While only Ferdinand actually testified, the Respondent's management observed Montas sitting at the hearing with other union witnesses.

[6] The judge states that he refused to accept evidence regarding the nature of the Respondent's campaign in order to establish animus, but that he permitted the General Counsel to make an offer of proof regarding such evidence. The record clearly shows that the judge did not require such an offer of proof and that he accepted such evidence in its entirety.

[7] *Holo-Krome Co.*, 293 NLRB 594 (1989), enf. denied 907 F.2d 1343 (2d Cir. 1990).

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

and Davis. Accordingly, on this basis, we adopt the judge's dismissal of the complaint allegations.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN HURTGEN, concurring.

I join my colleagues in dismissing the complaint.

I have previously stated, and I repeat here, that I do not believe that employer statements protected by Section 8(c) of the Act may be used to establish antiunion animus in support of an 8(a)(3) violation.[1] Nonetheless, assuming arguendo that the General Counsel in this case established both that the Respondent had knowledge of the employees' union support and that the Respondent harbored antiunion animus, I would dismiss the complaint. I find, as do my colleagues, that the Respondent met its rebuttal burden of demonstrating that it would have taken the same actions even in the absence of union activity.

I reach the same conclusion in regard to the 8(a)(4) allegations. That is, assuming arguendo, an animus against employee use of the Board's processes, the Respondent would have taken the same action even if that animus were not present.

Rick Concepcion, *Esq.*, for the General Counsel.
Thomas R. Gibbons, *Esq*. (*Jackson, Lewis, Schnitzler & Krupman)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on August 18 through 21 and on December 15 and 16, 1997. On various dates in November 1996 through April 1997, New England Health Care Employees Union, District 1199, AFL–CIO (the Union) filed unfair labor practice charges against Sunrise Health Care Corporation, d/b/a Mediplex of Stamford (Respondent). On June 17, 1997, a complaint issued alleging violations of Section 8(a)(1), (3), and (4) of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses and a consideration of the briefs submitted by counsels for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

Respondent is a corporation with an office and place of business in Stamford, Connecticut, engaged in the operation of a health care facility. Respondent annually derives gross income exceeding $100,000 from the operation of this facility. Respondent, in connection with its operation of this facility, annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Connecticut.

It is admitted, and I conclude, Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I conclude, the Union is a Labor organization within the meaning of Section 2(5) of the Act.

Respondent owns a chain of nursing home facilities in Connecticut, including the Stamford facility.

At this facility, Respondent provides skilled nursing and convalescent services to elderly patients and houses a total of approximately 120 patients on its three floors. Respondent provides rehabilitative services, known as subacute care, on two of its three floors. This service provides either rehabilitative or other specific treatment courses to short-term patients who are subsequently discharged on receiving their respective treatment. Of Respondent's 120 patients, approximately 35 live at the facility on a long-term basis.

On its first floor, Respondent houses the sickest patients, approximately 30 at any time. On its second floor, Respondent maintains about 45 beds dedicated to its rehabilitative services. On its third floor, Respondent maintains about 45 beds which it reserves for both short-term and long-term case patients. Patients on the third floor range in age between about 65 and over, and suffer from physical and/or mental infirmities, including dementia. Some of these patients can therefore pose a danger to either themselves or others by engaging in activities that are otherwise unsuitable for them.

Responsible for the facility's day-to-day operations is Administrator Lynn Hawkins-Winslow. Those reporting to Hawkins-Winslow include the director of nursing services (DNS), Rosella Crowley. On each of its three floors, Respondent has a nurse manager who is responsible on a 24-hour basis for the overall operations of that floor, including patient care and personnel issues. Each of these nurse managers reports directly to Crowley. The nurse manager on the first floor is Jackie Pinto and the nurse manager on the third floor is Carlos Pena. Pena works all of the first shift and into the second shift, usually working until 7 p.m.

At its facility, Respondent employs approximately 150 nurses, including registered nurses (RNs), licensed practical nurses (LPNs),. and certified nurse's aides (CNAs), and maintains three shifts—7 a.m. to 3 p.m. (first shift), 3 to 11 p.m. (second shift), and 11 p.m. to 7 a.m. (third shift) (Tr. 32, 895). Respondent's RNs and LPNs are not represented by a union. Respondent schedules more nurses during the first shift than on its other two shifts. All of Respondent's nurses report directly to the nurse manager on their respective floor. CNA are assigned to primarily provide care to approximately 9 or 10 patients per shift. Generally, CNAs remain assigned to the same patient for approximately 1 month before being rotated to a new set of patients.

All of Respondent's nurses are primarily responsible for ensuring proper patient care, and to this end, "are expected to work together and assist one another" in providing care. CNAs are primarily responsible for assisting RNs and LPNs. When a patient rings for assistance on the call bell, all personnel are responsible for answering the call bells and responding to resident requests.

During the course of their shift, CNAs are responsible for monitoring and charting certain of a patient's daily activities,

[1] See, e.g., my statement set forth in *Affiliated Foods, Inc.*, 328 NLRB 1107 fn. 3 (1999).

such as the percentage of a patient's food intake during meals, the number of bowel movements experienced by the patient, whether a patient has showered, has undergone daily physical therapy or changed position while sleeping, etc. CNAs record this activity on a patient flow sheet, adjusting their entries throughout their shift as patients' daily activities and conditions occur or change.

At its facility, Respondent maintains, a progressive discipline policy which applies to all employees. Under this policy, Respondent will use a progressive discipline for most disciplinary actions, as follows: Verbal warning, written warning, suspension (or final written warning), and termination. According to Crowley, all terminations" must be for just cause.

Federal and State Regulations specifically protect residents From abuse. Residents of nursing facilities are a particularly exposed population. Their stay in such a facility is necessitated by a short- or long-term illness or infirmity. These weaknesses leave them vulnerable on many fronts.

These protections include the right to be free from restraints. The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical sympto

Ultimately, if a facility does not meet the Federal and State standards it will suffer financially. If it is determined that a facility is not in compliance with Federal Regulations, Medicare reimbursement is interrupted. Continued violations could require closure of the facility. State agents periodically examine the health facility. This is termed a "Survey." It involves interviews, onsite inspections, and record analysis to determine whether the facility is meeting the statutory and regulatory requirements.

In addition to these statutory restrictions, Respondent maintains an internal policy further regulating patient abuse. The facility's patient abuse policy proscribes abuse generally and also specifically forbids verbal, sexual, physical, and mental abuse. These events are defined in the policy as follows:

> "Verbal Abuse" refers to any use of oral, written or gestured language that includes disparaging and derogatory terms to residents or their families, or within their hearing distance, to describe residents, regardless of their age, ability to comprehend or disability.
>
> "Physical Abuse" includes hitting, slapping, pinching, kicking etc. It also includes controlling behavior through corporal punishment.
>
> "Mental Abuse" includes but is not limited to, humiliation, harassment, threats of punishment or deprivation.

Respondent's attempts to prohibit this misconduct are far reaching. The rule against abuse is applicable to everyone related to the facility. Facility staff specifically must "refrain from all actions that could be considered abuse, mistreatment, and/or neglect." The rule however, is applied beyond only staff. According to the policy, residents of Respondent will not be subjected to abuse by anyone, including but not limited to facility staff, other residents, consultants, volunteer staff, family members, friends, or other individuals.

Respondent also commits not to employ persons who have been found to be abusers, to thoroughly investigate abuse allegations, and to "ensure that further potential abuse will not occur while the investigation is in progress." Finally, the policy enunciates the penalties for abuse by staff, "Based on the results of the facility's investigation, appropriate disciplinary action will be taken, up to and including termination of an employee."

Respondent enforces a four-step system of progressive discipline. The first step is a recorded verbal warning. The second step is a written warning. The third step is a final written warning or disciplinary suspension. Termination is the final step in the system.

The steps of progression are generally applicable to discipline. There are circumstances however, when the step system is not followed. In situations of severe misconduct, one or more of the steps may not be applied.

As set forth above Federal regulations govern the facility's reaction to allegations of resident abuse. The facility is specifically required to "prevent further potential abuse" while it investigates abuse allegations.

Prior to June 13, 1995, the Union commenced a campaign to organize Respondent's service and maintenance employees. The CNAs were included in this unit. LPNs and RNs were not included.

On June 13, 1995, the Union filed a representation petition seeking to represent the above unit. On June 26 of that year the Regional Director approved a Stipulated Election Agreement calling for an election to be conducted on August 3, among the "unit" employees.

The Union lost the election 51 to 50. There were 2 challenged ballots. The Union filed timely objections to the election.

A hearing on the Union's objections was conducted on November 27 and 28, 1995. The hearing officer found, and the Board affirmed, that Jose Charles, a low-level supervisor in the dietary department, told approximately four kitchen employees that he would surveil their union activity and impose discipline on them. Charles was also found to have told employees that receiving a raise depended on the failure of the Union's campaign. These statements found to have been made to a very small percentage of the more than 100 voters, there was no allegation or evidence of any impermissible conduct in the nursing department, the department in which all of the alleged discriminatees in the instant case worked.

The hearing officer concluded that Charles' statements to the employees, set forth above, were made pursuant to a management meeting of all managers about a week before the election. At this meeting Respondent's then labor relations consultant, Davey James, suggested that Respondent get rid of the active union supporters. The other objections were set aside. In this regard the hearing officer found that Respondent otherwise conducted itself appropriately during the union organizing campaign. Respondent thereafter terminated its relationship with James and subsequently hired its present counsel Thomas Gibbons, a member of the the firm Jackson, Lewis, Schnitzler & Krupman, a specialized law firm engaged in labor law.

A second election was ordered on July 19, 1996. On August 15, 1996, over a year after the first election. The Union won this election. During the year period between elections the Union did not file any unfair labor practice charges, or in any other manner allege that Respondent was engaging in any unlawful conduct. It is admitted that both the Union and Respondent waged intensive election campaigns.

Counsel for the General Counsel attempted to call witnesses and introduce other evidence to establish that Respondent conducted an intense campaign and to establish union animus, although admitting that such campaign did not violate the parameters of Section 8(c) of the Act. I refused to hear such evidence, but permitted counsel for the General Counsel to make an offer of proof. I affirm my ruling.

My ground for such ruling was that the General Counsel had alleged independent violations of Section 8(a)(1), and had already introduced testimony concerning various statements by Floor Supervisor Pena, discussed below, which the General Counsel contended would add something in establishing union animus. I concluded that taking evidence on the lawful election campaign could result in calling witnesses to give testimony and to identify and introduce, documents, cross-examination by Respondent on such testimony; that Respondent would call his own witnesses to establish the Union's extensive campaign against Respondent, and why Respondent had to wage such an extensiive campaign; and then cross-examination by counsel for the General Counsel. I concluded that although such testimony concerning a lawful election campaign, may have some slight relevance, it was far outweighed by the time such ligation might extend an already long and complicated case.

Section 8(c) of the Act provides;

> (c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

The Board held in *Holo-Krome Co.,* 293 NLRB 594 (1989), reversing the administrative law judge, that notwithstanding Section 8(c), evidence concerning an employer's election campaign can be introduced as evidence to show animus in an unfair labor practice trial.

The Second Circuit reversed the Board in *Holo-Krome*, finding that it was improper to refer to an employer's lawful expressions of opinion during a representation election campaign, as a basis for finding anti-union animus. 907 F.2d 1343 (2d Cir. 1990). The court pointed out that

> Several circuits have construed Section 8(c) as barring the "use [of] protected expression to build a case" against an employer or union, *NLRB v. Eastern Smelting & Refining Corp*., 598 F.2d 666, 670 (1st Cir. 1979), and have found substantial evidence lacking where the Board makes reference to a company's lawful expression of opposition to the union as a basis for concluding that subsequent acts or statements were unlawful. See *Florida Steel Corp. v. NLRB,* 587 F.2d 735, 750–54 (5th Cir. 1979); *NLRB v. Rockwell Manufacturing Co*., 271 F.2d 109, 118-19 (3d Cir. 1959*); Pittsburgh Steamship Co. V. NLRB,* 180 F.2d 731, 735 (6th Cir. 1950) ('Section 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct'), *aff'd*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

I conclude that the language in Section 8(c): "the expressing of views . . . shall not constitute evidence of an unfair labor practice"; means what it says. Animus is a necessary element to establish a violation of Section 8(a)(1) and (3). The election campaign evidence the General Counsel wanted to introduce was for the purpose of establishing a necessary element to the commission of an unfair labor practice. To permit the General Counsel to routinely try the facts of a lawful 8(c) campaign would in my opinion intrude on the protection established by Section 8(c) of the Act.

In order to support a prima facie case of discrimination the General Counsel must prove unlawful motivation. Unlawful motive can be proven by direct evidence or by circumstantial evidence which would establish general animus, *Lewis Grocer Co*., 282 NLRB 166 (1986).

Independent violations of Section 8(a)(1) constitute evidence of animus toward a union. The instant complaint alleged a single 8(a)(1) violation. Respondent is alleged to have threatened employees with more onerous working conditions in August 1996, sometime prior to the August 15 election. Specifically, Floor Supervisor Pena is alleged to have made such threat.

The General Counsel tried to support this allegation with testimony from Marie Cadot, a CNA. Cadot testified about a meeting in the third floor lounge before the August 1996 election. According to Cadot, Pena was discussing the Union with employees. Cadot testified that Pena said that if employees were represented by the Union, things would be different. She also testified that Pena said, with the Union, employees would not be able to talk to management as they "do now." During cross-examination, Cadot amplified this statement. She testified Pena told her, "There would be delegates and stewards, and people would have to go through the Union."

The Board has held that an employer is allowed to tell employees that union organization will result in, "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc*., 274 NLRB 377 (1985). Specifying that the change which will occur will result in loss of direct access to management is similarly legitimate. *Koons Ford of Annapolis,* 282 NLRB 506 (1986). These principles were recently reaffirmed by the Board. *Ben Venue Laboratories,* 317 NLRB 900 (1995).

An employer is also privileged to point out legal facts to employees. It is legal fact that if employees are represented, the union is their collective voice. This is the essence of 9(a) representation. I conclude the statements ascribed to Pena merely reflect these facts.

According to Cadot, Pena first said that things would change with unionization. He then explained that employees would not

be able to go directly to management with problems but would have to go through their union representatives.

These statements simply reflect the legal realities of organization. If the employees select the union as their representative, the union is their spokesman. Rather than dealing directly with supervision, represented employees must utilize their representative as an intermediary.

I conclude the statements attributed to Pena are not threatening or coercive. Rather they merely reflect the effect of 9(a) representation and are thus not violative. *Ben Venue Laboratories,* supra at 900.

Accordingly, I conclude this 8(a)(1) allegation in the consolidated complaint should be dismissed.

The General Counsel called Donna Brown, a former employee, employed by Respondent from October to December 1996; as a per diem LPN.

Brown testified that almost immediately on her employment she attended an orientation meeting with other LPNs and RNs. The meeting was conducted by the Staff Development Coordinator Sue Bocchetta. According to Brown, during the course of orientation, Bocchetta told the new employees that the Union represented certain employees at Respondent. The Union had won the August 15, 1996 election. These employees were also informed that Respondent had been mismanaged, but those mistakes were being remedied. According to Brown examples of poor management were given. These included letting nurses work without current licenses, not checking references, and not requiring 1-9 for Brown also testified that Bocchetta told the new employees that certain people were causing problems and should be written up if they did something wrong.

Brown also testified that shortly after Bocchetta's meeting, DNS Crowley met with the group. According to Brown, Crowley mentioned the Union represented employees and said that employees had sought representation because previous managers had done a poor job. Brown testified that Crowley told the nurses to discipline CNAs if they saw them acting improperly.

Brown also testified that she later attended a floor meeting conducted by Pena to discuss a staff member being struck by a resident. According to Brown, after the full meeting, Pena spoke to the nurses by themselves. In addition to Brown, Penaredondo, and Quiblan, Respondent's nurses were present at this smaller meeting. According to Brown, Pena told the three nurses that some people at Respondent were problems and they needed to get rid of them. She testified he also told them to "write them up" for anything they do. However, according to Brown, Pena did not mention the Union during this meeting.

I conclude Brown's testimony was not credible. She was evasive and hostile during cross-examination. She was reluctant to answer questions on cross-examination and equivocated on harmless questions. Brown's lack of candor was apparent at the very beginning of cross-examination. Brown had been terminated by Crowley for several No Call-No Show incidents. Brown acknowledged that per diem status did not excuse employees from the obligation to follow Respondent's procedures regarding callouts. Nonetheless, in her testimony she tried to show that *she* did not have any such obligation. Moreover, she even denied being terminated, claiming that she left because Crowley did not respect her children.

Brown's incredible statements were at times made gratuitously. When she was questioned as to the circumstances of her leaving Respondent, Brown was evasive. After she had maneuvered around several questions in this vein, I concluded on the record, that she "left with ill feeling." Notwithstanding such conclusions, and the improbability of her claim, Brown denied any bias. In fact, she testified incredibly that she "liked Mediplex!"

Even crediting Brown's testimony, it does not show any hostility, or unlawful intent on the part of Respondent. Brown admitted that as an LPN it was her responsibility to discipline CNAs who act improperly. After more of reluctance and evasion, Brown acknowledged that this is something expected of nurses, even in the organized facility where she now works. Careful examination of her testimony reveals that this is all she claimed was said to her by Pena. She was instructed to do what she knew to be her duty as a nurse. If CNAs made mistakes, they were to be disciplined. She was not told to fabricate performance errors. Nor was she told to "set up" certain aides for discipline. Rather, she was simply told to hold the CNAs to the appropriate standard of care. This is particularly significant because these statements were not linked to the Union. Even according to Brown's testimony, at orientation, new employees were merely told certain employees were represented. Finally, during the meeting with Pena, Brown said he made no mention of the Union at all.

Bocchetta, the facility staff development coordinator, testified that Pena is responsible for conducting new employee orientation. She specifically recalled orienting Brown when she started at Respondent. Bocchetta was new herself and Brown's group was the first orientation she conducted. She also remembered Brown because Brown asked many questions.

During orientation Bocchetta testified she made a very limited mention of the Union. When she described the chain of command, she told the orientees that the Union represented certain employees. Bocchetta denied that she said that some CNAs were "troublemakers and would have to be fired because of the Union." She denied telling nurses to write CNAs up for no reason. She denied saying that the Union had to go. She also denied she was instructed by anyone else in Respondent to do these things.

Rosella Crowley testified she did not conduct orientation meetings. She admitted addressing one group regarding scheduling; this was the exception and not her practice. Crowley testified (she) never attended a meeting where she told Brown or anyone else that the Union has "got to go," or gave instructions to write up CNAs. Crowley denied making such comments to Brown in any other setting, nor was she given any such instructions by other respondent officials.

I conclude Crowley's testimony was credible.[1] Crowley had no ax to grind with the Union. She has worked in the organized facilities, and in fact, has been both director and assistant director of nursing in homes represented by District 1199. When Crowley interviewed for the DNS position with Respondent, she knew that a representation election was scheduled. When

[1] As set forth below, I conclude that Crowley was a very credible witness throughout her entire testimony.

she accepted the position, she did not know if the employees had chosen to be represented or not. Crowley had nothing to do with the union campaigns and had no dealings with her superiors regarding hostility toward the Union.

Pena supervised nurses Penaredondo and Quiblan. He also recalled working with Brown. Pena denied he ever held a meeting with Brown, Penaredondo, and Quiblan, where he told them to write CNAs up for any thing they did. Nor did he ever tell them to write employees up in order "to get rid of them." Further, Pena denied making any such statements in any context, in or out of a meeting.

Pena's testimony in this regard was very clear and definite. He admitted to having worked with Brown and was unequivocal in his responses on both direct and cross-examination. Moreover, his testimony was consistent with that of Penaredondo and Quiblan, discussed below.

Shantii Penaredondo is a registered nurse assigned to the day shift on the third floor. She had been employed at Mediplex since July 1995. During the time in question in this case, Penaredondo's immediate supervisor was Pena.

Penaredondo works with Dennis Quiblan, an LPN who is also assigned to the third floor. Penaredondo remembered Brown to be an LPN who had worked various shifts on the third floor.

Penaredondo specifically denied, during her testimony, ever being present at a meeting with Quiblan and Brown where she heard Pena said, "guys, this is what I want you to do, anything the CNAs do, I want you to write them up." Nor was she ever at a meeting where she heard Pena say, I want you to write them up and get rid of them." Penaredondo, denied ever hearing Pena make any such statement, in any context.

As a registered nurse Penaredondo is not a bargaining unit employee. However, neither is she a supervisor or agent of Respondent. As set forth in detail below, I conclude she was a truthful witness who was not too reluctant to make admissions during her testimony, which were not in her best interests. There is no evidence that she was granted any particular favors or special treatment. In fact, she was disciplined as the result of one of the incidents at issue in this case. Her testimony was direct and forthright. Her demeanor made it clear she was only interested in presenting the truth. Moreover, counsel for the General Counsel elected not to cross-examine Penaredondo on this issue.

Quiblan is employed by Respondent as an LPN. He works the evening shift on the third floor. Quiblan has been employed at Respondent for about 3 years.

Pena is Quiblan's unit manager. Quiblan works with Penaredondo on the third floor.

Quiblan remembered Donna Brown. He credibly testified she was a per diem nurse with whom Quiblan worked with "a few times." Quiblan testified that Pena conducted frequent meetings with nurses. He specifically testified that he was never at a meeting with Penaredondo and Brown when Pena told them to write the CNAs up for anything they did. Quiblan never heard Pena say anything like this in any context.

Karen Consavage is an LPN employed by Respondent. She usually works the evening shift. She is a "floating" nurse and is not assigned a regular unit. Consavage began her employment with Respondent in October 1996. She was in the same orientation group as Brown. Consavage credibly testified that the orientation meetings were conducted by Bocchetta. Consavage credibly testified that in these meetings the only mention of the Union was when Bocchetta told the new employees that the CNAs were in the process of organizing.

Consavage credibly testified that neither Bocchetta, nor any other respondent official made any other statements relating to the Union. She denied that anyone said, "the Union was going to have to go." She denied being asked to write CNAs up no matter what they said or did. Consavage testified she did not attend any meetings with Brown where Crowley said "the Union has got to go. Some CNAs have got to go and to write up CNAs no matter what they do."

Consavage is an LPN. While she is not in the bargaining unit, she is not a supervisor. I found her testimony, was forthright and candid. She did not exhibit bias or enmity toward Brown. I credit her entire testimony.

All the above witnesses called by Respondent clearly and credibly refuted Brown's testimony. They were similarly consistent in their denials of Brown's allegations.

Bocchetta admitted that she mentioned the Union's organizing campaign. It is clear however, that this was merely general information for new employees. Bocchetta and Crowley were newcomers to the facility. They started with Respondent when the campaign was over. They had no interest in the CNAs' organizing activities. The Union was nonissue as far as they were concerned.

Pena also credibly denied making the threats Brown attributed to him. In order to believe Brown's allegations regarding Pena, two non upervisory employees have to be discredited. Quiblan and Penaredondo both testified that they participated in Pena's nurse meetings. They clearly and credibly testified that Pena did not make the statements Brown attributed to him in those meetings.

I credit the testimony of all Respondent's witnesses. These witnesses' recollections were definite. Their versions were consistent with each other and make sense. Three of them were not agents of Respondent. I set forth, I have concluded Brown was not a credible witness.

In summary, the credible evidence establishes that prior to the August 1995 election, Respondent hired Davey Jonas as a labor relations consultant, and that in a meeting of Respondent's supervisors, he advised them to fire active union supporters. However, Respondent, contrary to such advice, fired no one. The first election was held on August 3, 1995. Challenges were determinative. Objections were filed by the Union. The Board found that the only objectionable conduct was by Respondent that a low-level supervisor told four nonunit kitchen employees that he would surveil their union activity and impose discipline on them, and that getting a raise depended upon the Union losing the election. The election was set aside. Respondent thereafter terminated Jones' services, and hired its present labor attorney.

Thereafter, Respondent conducted on election campaign to persuade its employees to vote for no representation. This election was free of any unfair labor practices and was conducted within the limits of conduct permitted by Section 8(c) of the

Act. I conclude the low-level kitchen supervisor's conduct was isolated, and did not involve unit employees. I conclude there was no union animus between the first and second elections. A second election was then conducted which the Union won. Thereafter, the Union was certified.

Following the certification, the parties began collective-bargaining negotiations; Respondent bargained in good faith, and within a brief period of negotiations, agreed to a 3-year collective-bargaining agreement.

I conclude Respondent's conduct throughout this entire case was free of any 8(a)(1) conduct, and was within the clear meaning of Section 8(c) of the Act. Any objectionable statements that might arguably reflect animus, were isolated and did not relate to unit employees. Moreover, following the Board's certification, Respondent bargained in good faith and agreed on collective bargaining with a term of 3 years.

The General Counsel has failed to establish independent violations of the Act by Pena. Similarly, the discredited testimony of Brown of an overarching plan to fire CNAs was convincingly refuted.

An additional weakness in the General Counsel's argument is the major source from which the "animus" supposedly emanates. A great deal of testimony was dedicated to Pena's sentiments during the campaign. Witnesses testified that Pena did not want employees to vote in favor of representation and that he expressed this to employees in different ways. I find such statements are within the meaning of Section 8(c) and do not establish animus.

There is no dispute that the disciplinary decisions regarding all four of the alleged discriminatees were made by DNS Crowley. She received information from various sources, including Pena, but the actual decision to suspend or terminate was Crowley's.

I conclude Crowley's lack of animus toward the Union can also not be disputed. It is uncontroverted that she came to Mediplex after the election campaigns which the General Counsel has tried to paint as so bitter. She has worked before in an organized environment. In fact, she had held a director of nursing position in a facility in which District 1199 represented employees. When she took her present position with Respondent she was aware that it was possible that the Union would come to represent nursing department employees. However, I found her an extremely credible and non-biased witness. Her excellent recollection of details during both cross and direct testimony and her demeanor, convince me entirely that she is a truthful witness.

The Board looks at the lack of animus on the part of the decisionmaker to negate any discriminatory motive. In *Alexian Bros. Medical Center,* 307 NLRB 389 (1992), the Board overruled the judge's findings that the employer discriminatorily withheld a raise from a union supporter. In that case, the alleged discriminatee's immediate supervisor, Carney, initially evaluated his performance as "meets expectations." Carney's supervisor, Schmitt, however reviewed the evaluation and directed Carney to redo the evaluation giving an "unsatisfactory" rating. Id. at 390.

In *Alexian Bros*. the Judge found that Carney told the alleged discriminatee the negative reevaluation was, "because of the Union." Id. at 396. The Board discounted Carney's statement however, and noted the lack of animus "on the part of Respondent's higher management." Id. at 389. In this regard the Board noted several legitimate reasons which were the basis for Schmitt directing Carney to change the review. These reasons "were free of any suggestion of discriminatory intent."

The same reasoning applies in the instant case. The actual events which are alleged to be discriminatory were directed by "higher management" i.e., Crowley. Even if some animus were assigned to Pena, there is no basis for laying any hostility at the feet of Crowley. Moreover, the record reveals as set forth in detail below, that Crowley made her decisions based on legitimate concerns.

I conclude there is insufficient animus, if any, to support any of the allegations set forth in the complaint.

Concerning knowledge of union activities, the credible evidence fails to establish that the union organizational activities of the four alleged discriminatees was substantial, or that Respondent was aware of such activities.[2]

Although a representative of the Union was present everyday during the trial of this case, the General Counsel called no union representative, or any other witness to establish that these alleged discriminatees were any more active then at least 75 other union supporters.

Judy Davis, an alleged discriminatee attended union meetings. However, there is no evidence that Respondent was aware of such meetings. Davis also signed a union petition along with at least 75 other active union supporters. Davis also spoke out to other employees in favor of the Union in a variety of places inside Respondent's facility and outside, in Respondent's parking lot. Davis also distributed union bottoms, worn by many union supporters, including Davis on three separate dates. However, there is no credible evidence that Respondent was specifically aware of any of her union activity. Moreover, many other employees engaged in similiar activities and were not discriminated against.

With regard to Marie Duclos, she became active on behalf of the Union before the August election by signing the above union petition, speaking with coworkers about the benefits of joining the Union in Respondent's parking lot during her breaks, distributing union flyers; and by wearing the Union's button during the entire course of her shift on two separate occasions. However, there is no credible evidence that Respondent was specifically aware of Duclos' union activity. Similarly, most other employees engaged in such conduct without suffering any discrimination.

Minouche Ferdinand attended union meetings at the union hall, signed the above union petition, spoke with coworkers in favor of the Union inside Respondent's facility, wore a union button on her uniform on three separate occasions, and distributed union flyers and buttons in Respondent's employee parking lot before and after her shifts and during her breaks specifically. There is no credible evidence that Respondent was aware

[2] In connection with the 8(a)(1) and (3) violations alleged, I have credited Respondent's wintesses and not credited the General Counsel's witnesses. My reasons supporting such findings are set forth below.

of activities. Many other employees engaged in such activities without suffering any discrimination.

Marie Montas, similar to the other discriminatees, became active on behalf of the Union. In this regard, Montas signed the above union petition, and spoke with coworkers regarding the benefits of joining the Union, usually either in Respondent's parking lot or in the employee lunchroom. There is no credible evidence that Respondent was specifically aware of her activities. Many other employees engaged in these same activities without discrimination.

It is clear that over 75 unit employees were active union supporters. At least that many signed the Union's petition. Many others distributed the petition for additional signatures, distributed and wore union buttons and were talking to other unit employees in favor of the Union. Respondent was generally aware of such activity. However there is no evidence that the alleged discriminatees were any more active than any other union supporters. Nor is there sufficient evidence to establish that Respondent was specifically aware of their activities.

Significantly, I find no evidence as to why Respondent would discriminate against only these employees. There is no evidence that they were more active then other employees. Moreover, no union representative testified as to any union activities in which they were engaged.

In determining whether an employer discriminates against an employee because of his or her membership in or activity on behalf of a labor organization, the General Counsel has the burden of proving that the employee's membership in, or activities on behalf of such labor organization was a motivating factor in the discrimination alleged. Once such factor is established, the burden then shifts to the employer to establish that such action would have taken place in the absence of the employee's membership in, or activities on behalf of such labor organization, *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1982*); Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Knowledge of an alleged discriminatee's union activities and union animus are necessary elements in order to establish the General Counsel's burden. *Tri-State Truck Service v NLRB,* 616 F.2d. 65 (3d Cir. 1980).

As set forth and discussed above, the General Counsel contend that animus can be established by the 8(a((1) conduct alleged in the complaint and by Respondent's general antiunion attitude as evidenced by the Respondent's lawful 8(c) election campaign. Based on my conclusions, discussed above, I conclude the Union has failed to establish such animus which would support the 8(a)(1) and (3) violations.

Accordingly, I conclude the General Counsel has failed to establish union animus and knowledge and therefore failed to meet its *Wright Line* burden.

Concerning Respondent's knowledge—the evidence establishes that many employees, if not all, engage in activities similar to those of the alleged discriminatees without suffering any discrimination. There is no evidence that the alleged discriminatees were more active than the other employees. There is no evidence as to why Respondent would single them out for discrimination. Nor is there any evidence that Respondent was aware of their particular union activities. Accordingly, I conclude that Respondent had no knowledge of the discriminatees' union activities. I also conclude the alleged violations of Section 8(a)(1) and (3) in the complaint be dismissed.

In connection with the credibility of witnesses, I conclude that the General Counsel's witnesses, Montas, Duclos, Ferdinand, Davis, and Brown are not credible witnesses.

My reasons for not crediting Brown are set forth above.

As to Duclos, Ferdinand, Montas, and Davis, I was very unimpressed with their demeanor. Duclos, Ferdinand, and Montas were very vague as to the details of the 8(a)(1) and (3) allegations concerning them. Their testimony, during cross-examination, impressed me as being evasive. Moreover, their demeanor when testifying as to the details of their conduct with patients strongly impressed me as completely disinterested, indifferent, and totally unconcerned, consistent with discharge for patient abuse and falsification of patient records.

With respect to Davis, her demeanor throughout her entire testimony impressed me as arrogant, with a chip on the shoulder, an attitude consistent with her discharge for insubordination.

I credit Respondent's witnesses. I was extremely impressed with their demeanor. They testified in detail, with excellent recollection, were responsive to questions put to them on direct and cross-examination, and displayed an impartial attitude throughout their testimony. Moreover their testimony was mutually corroborated, in several important areas by obviously neutral witnesses, including the daughter of an abused patient and several witnesses no longer working for Respondent, described in detail below. Further, much of their testimony was corroborated by official nursing home records, like patients flow charts, and employee files which established in significant part, Respondent's progressive discipline policy, and the discipline of nurses who were involved, to some extent, with the conduct resulting in the alleged discriminatory allegations described in the complaint.

I conclude that the General Counsel has failed to establish animus and knowledge. Accordingly, I further conclude the General Counsel has failed to meet his *Wright Line* burden, and that the allegations of 8(a)(1) and (3) conduct alleged in the complaint be dismissed.

Assuming arguendo, that I were to conclude that the General Counsel met his *Wright Line* burden, I would nevertheless conclude that on the basis of the credible testimony of Respondent's witnesses, Respondent has conclusively established by such testimony that the action taken by Respondent, as alleged in the complaint would have taken place in the absence of any organizational activities of the Union.

The General Counsel alleges that Montas' hours were reduced about October 14, 1996. This was allegedly in retaliation for Montas' participation in the objections hearing of October 1996. However, schedule and payroll documents establish that Montas' work assignments were consistent throughout the period in issue.

Montas was originally hired to work on a part-time basis. She also worked as needed to "cover" for other employees who took time off. At times these coverage assignments were known ahead of time and Montas was scheduled to work. That she was covering for others was apparent from the schedule.

The summer and fall of 1996 schedule sheets establish the anticipated worktime of all the aides. These documents show that Montas was scheduled when other employees were not scheduled to work vacations. Whatever the reason, when regular aides were off the schedule Montas filled in.

As would be expected during the summer, Montas covered vacations for other aides. She also covered when another aide was moved to a different shift. There were weeks however, when Montas was not scheduled full time. During 2 weeks in August, well before the objections hearing, she was scheduled for 8 to 16 hours. This was because there were no leaves planned for other employees.

There were times when the schedule did not reflect actual hours worked. Call outs or other changes happened after the schedule was set and were not reflected on it. Montas' actual hours worked, however, are generally consistent with the schedule.

For 3 weeks in October, Montas worked 24 or 16 hours. This was down from 40 the weeks before. However, the schedule shows that during those October weeks no leaves were scheduled.

There were also weeks before the hearing when Montas did not work full time. In each of the months of May, June, July, August, and September, Montas worked at least 1 week under 40 hours, sometime as low as 16 hours. Even after October she had slow weeks. In November she worked only 27 hours 1 week.

Thus, the evidence establishes that there was no reduction in Montas' hours. Rather, she worked the same pattern she had throughout the summer and fall of 1996. When people were out on leave or otherwise, she filled in for them. When there were no vacations scheduled she did not work. The number of hours she worked each week varied overall. There were times in each month for 5 months preceding the objections hearing when she worked less than full time. There was no change at the time of the hearing.

Accordingly, I conclude that the reductions of hours alleged in the complaint was not attributable to her testimony in the objection hearing. Accordingly, I conclude that Respondent did not violate Section 8(a)(1) and (3) as alleged in the complaint.

In September 1996, Montas was assigned to provide care for patient Susan Annerichio. Annerichio was an elderly, wheelchair bound resident. She was active and mobile with her wheelchair and was usually lucid and communicative. On a weekend day in September, her breakfast tray was missing coffee flavoring. Annerichio wheeled herself into the hallway to ask Montas for the missing flavoring. Montas responded to this request by shouting at Annerichio and angrily pointing her finger at her, telling her to go back to her room.

Annerichio was visited frequently by her niece. She told her niece of Montas' shouting and misbehavior. Later that day her niece experienced Montas' abuse first hand. While she was visiting with her aunt in the dining room, Montas came in and confronted them. Montas went to Annerichio and demanded to know what she was telling her niece, saying that she did not do anything. When the niece told Montas her conduct was inappropriate, Montas began to argue with her.

Annerichios' niece complained of Montas' misconduct to the social service department. The social service worker documented her complaint and forwarded it to Pena, Montas' supervisor.

Pena then investigated the allegation. He interviewed Annerichio. She confirmed the report from social services. After speaking to Annerichio, Pena spoke to her niece. The niece also confirmed the report from social services.

Pena reported his findings to Crowley. She decided that she had sufficient information to conclude that verbal abuse had taken place. Not only had these individuals detailed these events independently to Pena, but the niece had earlier reported the same complaint to Social Services.

Based on this information, Crowley decided Montas should be disciplined. She reviewed Montas' file and noticed that she had received no previous discipline. Crowley considered this and decided that since the abuse was not physical, immediate termination was not appropriate. However, he concluded that any form of abuse is extraordinary and demands strict punishment. Crowley therefore suspended Montas.

Crowley credibly testified that she did not want there to be recurrence of the verbal abuse, or even possibly a worse event. To guard against this, Montas' return to work was made conditional. Before she came back Montas was reeducated in residents rights and abuse. Thus, if there were any gaps in her training or any misunderstandings which had contributed to her misconduct with Annerichio and her niece, they would be addressed. To make sure that Montas knew what behavior was expected of her, she, Montas, was required to work on the day shift. As set out in detail above, there are many more supervisors working on the day shift than at any other time. These people would be available as a resource for Montas if needed. Montas in fact complied with these conditions and returned to work.

I conclude that Respondent's actions in this regard were completely legitimate and Respondent could have seized on the initial complaint to social services and fired Montas, immediately. This was not done. Respondent, at that point had two consistent statements from two people detailing abusive conduct. There was clearly grounds to terminate Montas. Yet, Crowley did not take advantage of the "opportunity." She considered Montas' record and decided to give her another chance. In fact, in giving her a second chance she made sure that Montas was not confused or uninformed as to what was expected of her. Montas was specifically trained resident rights and abuse before she came back. Further, she was put back on the shift that had the most supervisory support available to her to insure proper training.

If Respondent simply wanted to get rid of Montas, for her union activity, the opportunity was there after this incident. Respondent did not take this "opportunity" and fire Montas. I conclude that Respondent did not violate Section 8(a)(1) and (3) by the suspension of Montas.

In January 1997, Montas was assigned to work the third floor. Also working on that floor was nurse Shantii Penaredondo. One of the patient residents on the third floor was a male patient, Derigibus. Derigibus was an elderly paraplegic,

who was incontinent. Because of his condition he wore a diaper and needed to be changed regularly.

At around noon, Derigibus called the nurses station and asked to be changed. Penaredondo told Montas to change Derigibus. A short time later, when Derigibus was not changed, Penaredondo reminded Montas of her instructions. Montas acknowledged the assignment and told Penaredondo that she would change Derigibus.

At about 1 p.m. Penaredondo was administering medications to the residents. This is a function that can only be performed by a licensed nurse and involves the nurse going into resident rooms. While she was medicating the residents, Penaredondo spoke to Derigibus. Derigibus told Penaredondo that he had not yet been changed. Because she was involved in administering medications and because Derigibus indicated he would wait for Montas, Penaredondo instructed Montas, once again, to change Derigibus. Montas said again, she would do so.

When Penaredondo completed her medication duties she asked Montas if she had changed Derigibus. Montas said she had not and told Penaredondo that she was scheduled for lunch. Penaredondo told her to check with Derigibus to see if he had wanted to be changed before Montas took her break. Montas reported that Derigibus said he would wait. Shortly after Montas left, Derigibus called the nurses station and said that he had still not been changed. He also said that Montas had not checked with him before she went on break. Penaredondo again told Montas to change him. Rather then comply, Montas went to work with another resident first and finally changed Derigibus only after Penaredondo told her to do, yet again, one more time. Approximately, 2 hours went by between the first instruction to clean Dregibus, and the time he was finally changed. At the end of the shift Penaredondo told the nurse manager, Pena, about the event.

Pena investigated this situation after Penaredondo's report. He asked Penaredondo to reduce her story to writing. She did this and it was consistent with her oral report. Pena also spoke to Derigibus. The resident told Pena that he has asked to be changed but had waited 2 hours before he was given care. He also stated that Montas did not ask him if he would wait until she took her break. Pena also interviewed Derigibus' therapist and unit clerk.

The therapist told Pena that Derigibus was upset that day and said he had been left unchanged. The unit clerk confirmed that Penaredondo had instructed Montas to change Derigibus at about noon and that Montas said she would do so. The unit clerk also told Pena that Derigibus told her Montas had not asked him if he would wait to be changed until after her break. She thus concluded that Montas had lied to Penaredondo. The unit clerk gave Pena a written statement detailing this information.

Pena and Crowley reviewed their results of Pena's investigation. This included the written statements that were provided. Crowley determined that Montas has neglected Derigibus' care. She had been given an assignment and had acknowledged it, saying she would take care of the resident. Despite this she simply ignored him. When reminded again, she lied, saying that Derigibus told her he would wait for her to finish her break to work with him. Crowley concluded that Montas ignored the instructions she was given, ignored the resident and finally, she lied about what the patient said. Crowley further concluded such conduct was even more egregious when the condition of the resident was considered. Crowley finally concluded that Montas' conduct was blantently negligent.

Crowley testified that she then considered Montas' disciplinary history. Montas had been verbally abusive to a resident and her family just a few months before. At that time Crowley had considered Montas' then clean record and decided to give her a second chance. Based on Montas' record and the facts of the Derigibus incident, Crowley terminated Montas. The facts establish that such termination followed Respondent's usual discipline procedure.

Crowley also reviewed Penaredondo's conduct in this matter. Crowley concluded that although it is not a licensed nurse's function to change patients diapers, she should have checked to see if Derigibus' diaper had been changed and that she should have supervised Montas more closely. Accordingly, following Respondent's discipline procedure, since Penaredondo had received an oral warning on another matter, she received a written warning for her neglect.

Accordingly, I conclude that the discharge of Montas did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

In January 1997, the family of patient Musilli reported finding him tied into his wheelchair, facing a wall. The family had confronted Duclos who admitted leaving him in this condition when she went to help another aide. Respondent investigated these allegations. The family member gave a written statement which was consistent with the initial report. Duclos also gave a statement and admitted improperly restraining the resident.

Federal regulations and State statutes govern all aspects of nursing home operation. These include prohibitions of patient abuse and neglect. Crowley considered Duclos' admission in light of these regulations. She testified she considered terminating Duclos but instead decided to give her another chance. Rather than being terminated, Duclos was suspended for 3 days.

Before Respondent could allow Duclos to interact with residents again, however, Crowley concluded she needed to be assured that Duclos knew what was required of her. As a condition of her return, Duclos was required to undergo reeducation. She was retrained in resident rights and restraint policy. Further, she was required to work on the first shift as was Mantos, so there would be more supervisory nurses available to her for assistance if she needed it.

Respondent's policy was not applied only to Montas and Duclos. In 1994, alleged discriminate Ferdinand, had also been involved in an abuse allegation. She was suspended just a Montas and Duclos were. Also, just as they were, she was required to undergo retraining and work the day shift.

Thus, a year before the Union's first campaign, Respondent imposed retraining and enhanced supervision as conditions of reinstatement after abuse suspensions. Requiring Duclos to be retrained and work the day shift was nothing new. It was merely a continuation of Respondent's established policy implemented for the protection of residents.

There is no credible evidence which would establish that. Duclos was singled out for this requirement. She was merely treated as any other aide would be. She was told what would be required of her before she could return, yet she resisted. Duclos was not satisfied with working the first shift.

Duclos claimed she could not work days because of child care problems. Crowley gave her suggestions to help. She had difficulty resolving these problems, so Respondent let her come to work late until she made arrangements. Finally, when Duclos was able to return to work on the first shift, she immediately hurt herself. She was then out of work or on modified duty for several weeks.

On her first day back to full duty, Duclos was assigned to the first floor under Unit Manager Jackie Pinto. She was assigned to care for an elderly, wheelchair bound female resident. The resident, Cordaro, spoke only Italian.

The credible testimony of registered nurse, Andan, established that she helped Duclos put Cordaro on the toilet at about 10:40 a.m. Andan credibly testified that she was aware of the time because she had spoken to Duclos about showering and dressing another resident who had an 11 a.m. therapy appointment. Andan clearly remembered the conversation about the therapy appointment as occurring before 11 a.m.

At 11 a.m. therapist Roberts brought Cordaro's roommate back to their room. She saw Duclos and Cordaro in the room. As she was working with Cordaro's roommate, Roberts saw Duclos wheel Cordaro into the bathroom. Roberts then heard Duclos shouting at Cordaro. When Roberts went to offer her help, Duclos slammed the bathroom door in her face. Roberts reported this to Andan who later checked the room but did not see Duclos or Cordaro.

Within a short time, Therapist Barcia, who spoke Italian and frequently visited with Cordaro and interpreted for her, stopped in Cordaro's room. Barcia saw that Cordaro was upset and covered with excrement. Cordaro told Barcia that Duclos had shouted at her and pushed her.

Cordaro's daughter also visited her mother that same day. She credibly testified that her mother was upset and asked her what was wrong. Cordaro told her daughter that her Duclos had mistreated her. Cordaro's daughter smelled and then noticed her mother had feces on her hands but had not been incontinent in her chair. She reported this to Andan.

Respondent collected written statements from all parties involved. Barcia memorialized what Cordaro said to her. Roberts wrote what she had seen and heard in the room. Cordaro's daughter and Andan also gave written statements. These documents were all consistent with initial reports and indicated Duclos mistreated Cordaro.

Duclos was asked to provide a statement detailing her actions that morning. Rather than do so, a union representative gave Respondent an incomplete version of Duclos' position. Nonetheless, Respondent followed up on Duclos' apparent contention that she had never helped Cordaro to the toilet with another aide or a nurse. Respondent also interviewed CNA Faustin. Faustin said that he had helped Duclos once with Cordaro but had left with Cordaro on the toilet and had not returned.

Faustin saw nothing improper when he was with Duclos, but was not with her other than for a brief time. Faustin was thus not in a position to clear Duclos. He did not claim to be with her in the bathroom when Roberts heard her shout at Cordaro. Moreover, he only helped toilet Cordaro once. Cordaro was known to use the toilet several times a morning.

Duclos also indicated that Andan had helped her toilet Cordaro. As set out above, Andan did this one time, before Roberts saw Duclos take her into the bathroom and shout at her.

Crowley reviewed the results of the investigation. This included all the written statements including Duclos'. Crowley concluded that Duclos had neglected her responsibility to clean Cordaro, had shouted at her and treated her roughly, pushing her into the chair as Cordaro reported. Crowley credibly testified that she considered this information in conjunction with Duclos' record, specifically her recent suspension for improper restraint. She concluded that notwithstanding having received the suspension and then being retrained, Duclos had again abused a patient. Crowley ordered her terminated.

Duclos denied the patient abuse attributed to her by Crowley. However both Barcia and Cardaro's daughter had no reason to give false testimony. Barcia has left and has no connection with the Respondent's employ. Cordaro has since died, and her daughter has no connection with Respondent at the time she testified. As set forth above, I have concluded Respondent's witnesses, including Barcia and Cordaro's daughter, to be entirely credible.

I conclude that both Andan and Faustin helped Duclos toilet Cordaro on that morning. Andan at about 10:40 a.m. and Faustin around the same time. Then at about 11 a.m. Cordaro needed to go to the bathroom again. This was not unusual since she went to the toilet several times in the morning. This trip to the bathroom was the one Roberts observed. During this time, Duclos became frustrated with Cordaro and verbally abused her, shouting at her, and pushed her. Duclos also left Cordaro to attempt to clean herself and neglected to wash Cordaro's hands afterward. This resulted in Cordaro sitting in her wheelchair, upset about having been mistreated and left with feces on her hands.

I further conclude that her initial suspension for patient abuse and subsequent discharge for a second patient abuse did not violate Section 8(a)(1) and (3) as alleged

The physical and emotional condition of Respondent's patients is closely monitored. One document used in this monitoring is a "Daily Flow Sheet." CNAs are responsible for accurately completing this sheet. Ferdinand, an alleged discriminatee, completed and initialed a resident's sheet barely halfway through a shift. In doing so, she put in information that she could not have known. She inaccurately completed the patient's medical record. She acknowledged having done so, contending that everyone did. Respondent investigated her contention and discovered that, in fact, she was the only CNA acting in this fashion. Each patient has a chart in their file logging various daily activities. These range from food and fluid intake and output to hygiene and sleep patterns. This information is critical to making current assessments of each patient's physical and emotional well being and is noted by each shift

each day. Based on information contained in the charts, medications are prescribed and changed and various therapies are ordered. It is the primary responsibility of the CNA to complete the chart. However, a licensed nurse must cosign at the end of each shift.

Because of the requirement for accuracy, CNAs are instructed to wait until about 1 hour before the end of their shift to complete their charts. A chart is completed when all the information is filled in and the aide has initialed the document.

If a chart is completed early, it is by definition going to be an inaccurate and false record. The information on the chart reflects the patient's status for the entire shift.

Ferdinand was an evening shift aide. Her shift began at 3 and ended at 11 p.m. On October 25, Pena had reason to speak to Ferdinand at dinnertime in the middle of her shift. As the result of instructions from Pena, Ferdinand went to pick up dinner trays and left her chart book at the nurses station. Pena reviewed the chart book and discovered that several flow sheets for patients assigned to Ferdinand were completed. Pena noted particularly that patient Love's chart was complete and initialed.

Pena confronted Ferdinand with her having completed her charting too early. Ferdinand did not deny her actions. She claimed in her defense that she had worked with the resident the previous day so she knew what information to log in and, that all the CNAs did the same thing.

I conclude Ferdinand's first defense is invalid on its face. For Ferdinand to be able to accurately chart a patient early because she had worked with her previously, Ferdinand would have to be able to see the future. No patient, no matter how stable, can be assumed to be in exactly the same condition day after day. Love's hygiene record, her waste functions, whether she had visitors, and how long she slept, whether she takes food orally, are all important facts which should be accurately recorded for review by LPNs or doctors, if necessary, of whether she takes food orally. Yet each of these factors was completed less than halfway through the shift. There is no way at 6 or 7 p.m., Ferdinand could know how much sleep the resident was going to get by the end of the shift 4 or 5 hours later! Ferdinand could not know early in the evening if the resident would have a visitor later!

When Crowley was informed of Ferdinand's flow sheet she commenced an investigation to determine how the other CNA's charted their flow sheets. Crowley credibly testified that all the other CNA's charted their flow sheets within an hour before the end of their shift.

Because she was a new employee, Crowley testified that she did not know what the practice was regarding when charts were completed. If the staff were routinely completing the charts early, the improper practice would have to be stopped. Ferdinand would have then been only one of many making the same mistake. If that were the case everyone would have to be retrained and it would have been unfair to single out Ferdinand for any action. To answer this question and follow up on Ferdinand's claim, Crowley had the rest of the CNAs polled to see when they charted. The CNAs all indicated that they charted at appropriate times. Not one indicated that they charted the way Ferdinand did.

The General Counsel contends that this survey is somehow tainted. Despite such contention, there is no evidence that Respondent did anything other than try to investigate Ferdinand's claim fairly. There is no testimony that the investigation was conducted coercively. Crowley relied on the integrity of Respondent's employees and presumed that it would receive honest answers. In fact, the results of the investigation were substantiated by testimony of the General Counsel's own witness. CNA Faustin testified that he does not complete his charting until the last hour of his shift. Faustin's testimony was consistent with the results of the investigation of the evening aides.

Despite Ferdinand's claim that "everybody does it," Ferdinand simply knew better. Respondent uses a document which details the approximate times for the aides on each shift to perform their different tasks. This document clearly tells the aides that they are to chart at the end of the shift, just as Faustin and the evening aides all said they did. Ferdinand received a copy of this list when she started and signed the front page. I conclude that for her to claim that she did not know that she was doing anything wrong is disingenuous at best. Moreover, I conclude that it is a matter of common sense that these records cannot be completed beforehand.

Based on Crowley's investigation, Crowley credibly testified she was convinced that Ferdinand was not merely one part of a larger record keeping problem. Rather, the facts indicated to her that Ferdinand was intentionally completing her charts well before they should be done.

Crowley testified she viewed this as a very serious matter. It involved a patient's medical records. Completing the flow sheet early, at a time when it was impossible to know that the information was accurate, demonstrated a complete lack of concern for the validity of such official records. Since the charts are important information sources for evaluation and treatment of patients, Crowley concluded this conduct jeopardized the case of the patients.

Crowley was aware of the Respondent's progressive discipline policy, which also allows for immediate termination under proper circumstances. She concluded that falsification of such records was extraordinary circumstance. She based such conclusion on the fact that such flow sheets bear on the health and safety of its patients. Invalid information on the chart can result in errors in assessment or treatment of a patient. Crowley thus concluded that Ferdinand should be terminated. Crowley credibly testified she had made the same decision when faced with this situation at a previous employer. Crowley made the decision to terminate Ferdinand.

I conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act by such termination.

Davis started working for Respondent in April 1996. Within a month she was leaving work early. During the first week of June, she was given a verbal warning about her attendance problem. She was cautioned that this conduct was not acceptable. The narrative in the warning told Davis she would receive further discipline for any further misconduct. At the time of this warning, Davis admitted she was aware of Respondent's disciplinary policy. This warning was not alleged to be violative of the Act.

On June 25, Davis did not show up for her work shift. Pena, Davis' supervisor, called her at home to see if she was coming in. When Pena told Davis she was supposed to be at work, she cursed at him and said she was not scheduled. She accused Pena of sabotaging her schedule for some unknown reason.

After first arguing about the schedule and challenging Pena, Davis then claimed not to feel well. Pena asked Davis again if she was coming into work. Davis did not give Pena a straight answer. He asked her again. This call took place at a desk in the open area around the administrative offices. Crowley was using a telephone near to Pena and overheard the repeated questions from Pena. She went to Pena to see if she could help. When she was next to him, Pena moved the receiver slightly away from his ear. This allowed both Pena and Crowley to hear what Davis was saying. Both Pena and Crowley credibly testified they heard Davis state to Pena: "I'll fucking be there when I'm there."

Based on her discussion with Pena concerning that part of the conversation she did not overhear, and that which she did overhear, Crowley reviewed Davis' personnel record and decided that suspension was the appropriate level of discipline. Davis admitted the details of this conversation but denied cursing at Pena. In view of my credibility resolutions described above, I do not credit Davis. Moreover, both Pena and Crowley testified consistently as to the vulgar statement overheard by Crowley.

Crowley credibly testified that in view of Davis' length of employment, 2 months, in view of her prior warning, and the nature of her insubordination directed to her supervisor, Pena, suspension was appropriate.

Accordingly, I conclude that Davis' suspension was appropriate and did not violate Section 8(a)(1) and (3) of the Act.

On November 26 all the CNAs, on the day shift, on the third floor, heard an employee "calling out." As frequently happens in these situations, the remaining staff have to carry a heavier load because the callout's assignment is divided among them. Pena was attempting to rearrange the workload. Davis was assigned to help with an admittedly difficult patient. She wanted a different assignment. Pena assigned her to another patient. As Davis was voicing her reluctance to work with this second patient, LPN Pizzutti walked by. Pizzutti overheard Davis, and told her, "Somebody has to care of her." Davis was visibly angry at Pizzutti's remark and left the area.

Davis went to Crowley to complain about her assignment. In an attempt to accommodate Davis, Crowley told Pena to allow the CNAs as a group to determine how the extra work would be assigned. The group of CNAs by a majority vote gave Davis yet a third assignment with which she was not happy, but accepted such assignment.

At about mid-shift Davis asked Pizzutti for help using a mechanical lift with one of the patients she had initially resisted being assigned to at the beginning of the shift. Pizzutti decided that necessary preliminary work had not yet been done and told Davis that she would help her once this preliminary work had been completed.

The anger between Davis and Pizzutti described above, then resurfaced. Davis walked away from caring for the resident and stormed into the nurses station. Pizzutti asked Davis what she was doing. Davis announced that she was taking her break and leaving the floor. Pizzutti and Davis began to argue, in loud voices, at the nurses station. Their voices were so loud that Pena heard them and went to the station to see what the ruckus was about.

When Pena saw them, his first act was to stop the argument. Their argument was taking place at the very hub of the patient care area. After Davis and Pizzutti stopped arguing, Pena tried to find out what had happened. He first spoke to Pizzutti and then to Davis. Their versions were consistent. Each felt put on by the other and neither denied that they were arguing loudly in a patient care area.

Shortly thereafter, Pena made rounds of the patients rooms He noticed several rooms were not straightened and that several patients had not yet received their scheduled care. The assignments sheets established that these rooms and patients were assigned to Davis.

A short while later Pena told Davis and Pizzutti that their conduct was unprofessional and they would receive discipline. He discussed the incident with Crowley. She agreed that Davis and Pizzutti behaved unprofessionally and decided to discipline both employees.

Crowley then reviewed Davis' and Pizzutti's files. Davis had been suspended just a month before and had been warned then that further misconduct would result in termination. Crowley acting consistently with both the progressive discipline policy and the warning that had been given to Davis, decided that termination was in order and told Pena to deliver a termination notice to Davis.

Crowley also concluded that Davis was not the only one who had acted inappropriately. There was no dispute that Puzzutti was arguing just as loudly. Crowley determined both employees were to be disciplined. Unlike Davis however, Pizzutti had a clean file. Accordingly, Pizzutti was disciplined at the first step. She was given a verbal warning.

Given Davis' work record over a short period of time, that Pizzutti was also disciplined, and that both Pizzutti and Davis were disciplined in accordance with Respondent's progressive disciplined policy, I conclude that Davis' termination did not violate Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

ORDER

The complaint is dismissed in its entirety.